

OCT 5 1956

JOHN T. FEY, Clerk

No. 401 18

In the Supreme Court of the United States

OCTOBER TERM, 1956 7

CITY OF DETROIT, A MICHIGAN MUNICIPAL CORPORATION,
AND COUNTY OF WAYNE, A MICHIGAN CONSTITU-
TIONAL BODY CORPORATE, APPELLANTS

v.

THE MURRAY CORPORATION OF AMERICA, A DELAWARE
CORPORATION, AND THE UNITED STATES OF AMERICA

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR
THE SIXTH CIRCUIT

MOTION OF THE UNITED STATES TO DISMISS OR AFFIRM

J. LEE RANKIN,

Solicitor General,

CHARLES K. RICE,

Assistant Attorney General,

HILBERT P. ZARKY,

LYLE M. TURNER,

H. EUGENE HEINE, JR.,

Attorneys,

Department of Justice, Washington 25, D. C.

INDEX

(A) THIS COURT LACKS JURISDICTION OF THE APPEAL.....	Page 2
(B) THE QUESTIONS PRESENTED ARE UNSUBSTANTIAL.....	3

CITATIONS

Cases:

Barter v. Continental Casualty Co., 284 U. S. 578.....	2
Bradford Electric Co. v. Clapper, 284 U. S. 221.....	2
Douglas Aircraft Co. v. Byram, 57 Cal. App. 2d 311.....	5
Kern-Limerick, Inc. v. Scurlock, 347 U. S. 110.....	3, 4, 6
Pub. Serv. Comm. v. Batesville Tel. Co., 284 U. S. 6.....	2
Read-York, In Re, 152 F. 2d 313.....	5
United States v. Allegheny County, 322 U. S. 174.....	3, 6
United States v. Ansonia Brass & Co., 218 U. S. 452.....	5
Wilson v. Cook, 327 U. S. 474.....	3

Statutes:

Judicial Code, Sec. 240.....	2
Revised Statutes, Sec. 3648 (31 U. S. C. 1952 ed., Sec. 529).....	4
28 U. S. C., Sec. 1254 (2).....	2

Miscellaneous:

1 Comp. Gen. 143 (1921).....	5
20 Comp. Gen. 917 (1941).....	5
28 Comp. Gen. 468 (1949).....	5
18 Op. A. G. 105 (1885).....	5
20 Op. A. G. 746 (1894).....	5
29 Op. A. G. 46 (1911).....	5
Revised Rules of the Supreme Court of the United States, Rule 16.....	1

In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 401

CITY OF DETROIT, A MICHIGAN MUNICIPAL CORPORATION,
AND COUNTY OF WAYNE, A MICHIGAN CONSTITUTIONAL BODY CORPORATE, APPELLANTS

v.

THE MURRAY CORPORATION OF AMERICA, A DELAWARE CORPORATION, AND THE UNITED STATES OF AMERICA

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR
THE SIXTH CIRCUIT

MOTION OF THE UNITED STATES TO DISMISS OR AFFIRM

Pursuant to Rule 16, paragraph 1, of the Revised Rules of this Court, the United States of America, intervenor and appellee, moves (a) that the appeal be dismissed on the ground that the appeal is not within the jurisdiction of this Court, and (b) in the alternative, that the judgment of United States Court of Appeals for the Sixth Circuit be affirmed on the ground that the questions raised by the appellants are so unsubstantial as not to need further argument.

(A) THIS COURT LACKS JURISDICTION OF THE APPEAL

Appellants contend that jurisdiction is conferred on this Court by 28 U. S. C., Section 1254 (2), which reads as follows:

SEC. 1254. *Courts of appeals; certiorari; appeal; certified questions*

Cases in the courts of appeals may be reviewed by the following methods:

* * * *

(2) By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, but such appeal shall preclude review by writ of certiorari at the instance of such appellant, and the review on appeal shall be restricted to the Federal questions presented;

* * * *

Section 1254 (2) governing appeals from the Courts of Appeals is based upon former Section 240 of the Judicial Code, as amended. Under both provisions appeal to this Court is limited to cases where a state statute has been held by a Court of Appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States. If, as we believe to be manifest in the instant case, the Court of Appeals did not hold a state law invalid, this Court lacks jurisdiction of the appeal. *Pub. Serv. Comm. v. Batesville Tel. Co.*, 284 U. S. 6; *Bradford Electric Co. v. Clapper*, 284 U. S. 221; *Baxter v. Continental Casualty Co.*, 284 U. S. 578.

Here, neither the District Court nor the Court of Appeals, which affirmed the trial court, held any state

law invalid. The principal issue argued and decided was whether, under the terms of certain sub-contracts, the United States was the absolute owner of particular personal property, in the possession of the Murray Corporation of America on January 1, 1952. Appellants assessed to the Murray Corporation an *ad valorem* personal property tax upon that property. Since there was no statute or local ordinance which even purported to levy a tax on property belonging to the United States, the decision below required only a consideration of the validity of the tax assessment as applied to the particular property involved. Once the lower courts found, as they did, that the United States had authority to and did acquire ownership of the property in question, it necessarily followed that the tax could not be imposed. *United States v. Allegheny County*, 322 U. S. 174; *Kern-Limerick, Inc. v. Scurlock*, 347 U. S. 110.

Since the Court of Appeals was required to consider only whether the particular property belonged to the United States and hence was not subject to tax, and since no state statute was declared invalid under the Federal Constitution, this Court is without jurisdiction on appeal. Cf. *Wilson v. Cook*, 327 U. S. 474. Accordingly, it is respectfully submitted that the appeal should be dismissed.

(B) THE QUESTIONS PRESENTED ARE UNSUBSTANTIAL

In any event, it is submitted that the judgment of the Court of Appeals for the Sixth Circuit should be affirmed, since it is manifest that the questions on

which the decision depends are so unsubstantial as not to need further argument.

In their Jurisdictional Statement (pp. 5-6) appellants present three questions:

First, did the contracting officers of the United States have authority to enter into contracts which provide for the vesting of title to parts, materials, etc., in the United States upon the making of a partial payment?

Second, was the title which vested in the United States under the contracts absolute title or merely paper or security title?

Third, is a state or local *ad valorem* property tax on the property of the United States constitutionally valid where the tax was assessed to the contractor and not directly to the United States?

Each of these questions was fully considered by the Court of Appeals and, on the basis of the facts found, was correctly decided in accordance with the decisions of this Court.

1. As to the first question, namely, the authority of the Government's contracting officers to enter into partial payment contracts, *Kern-Limerick, Inc. v. Scurlock* 347 U. S. 110, affirms the authority of contracting officers to negotiate any type of contract not specifically prohibited which will promote the best interests of the Government. Asserting that the Government is specifically prohibited by statute from entering into contracts providing for partial payments, appellants rely upon Section 3648, Revised Statutes (31 U. S. C. 1952 ed., Sec. 529). (Jurisdictional Statement 11a-12a.) However, that provision prohibits only pay-

ments in advance of any performance of services or payments in advance of delivery of articles, title to which is not taken prior to delivery. Appellants have failed to recognize the fundamental distinction between advance or unearned payments, which are not involved here, and partial payments, such as were made to the contractor here.

As early as 1885, Section 3648 was interpreted by the Attorney General as permitting the making of partial payments, provided title to the property passed to the Government at the time such payments were made. 18 Op. A. G. 105 (1885). See also to the same effect: 20 Op. A. G. 746 (1894); 29 Op. A. G. 46 (1911). The same view consistently has been expressed by the Comptroller General. 1 Comp. Gen. 143 (1921); 20 Comp. Gen. 917 (1941); 28 Comp. Gen. 468, 470 (1949). Cf. *United States v. Ansonia Brass &c. Co.*, 218 U. S. 452, 466-470; *Douglas Aircraft Co. v. Byram*, 57 Cal. App. 2d 311; *In Re Read-York*, 152 F. 2d 313 (C. A. 7th).

The Court of Appeals correctly rejected appellants' interpretation of Section 3648, and affirmed the trial court's holding that the partial payment clauses were not invalid for want of authority or for non-conformity with the federal statutes. (Jurisdictional Statement 4a.)

2. The second question, namely, whether absolute title or merely security title vested in the United States, was settled in *United States v. Ansonia Brass &c. Co.*, 218 U. S. 452, 466-470. The contract there provided that (p. 466): "The parts paid for under

the system of partial payments * * * shall become thereby the sole property of the United States * * *." The contractual provision here provides that: "Upon the making of any partial payment * * * title to all parts, materials, inventories, work in process and non-durable tools theretofore acquired or produced * * * shall forthwith vest in the Government * * *." (Jurisdiction Statement 13a.) The contractual provisions in both cases express the intention of the parties that the Government should acquire ownership of the property prior to completion. In both contracts, particular provisions, such as payment of insurance premiums by the contractor and retention by the Government of the right to reject upon completion, were not inconsistent with the vesting of title in the United States and did not detract from the binding force of the distinct contract provisions making the United States the owner.

The Court of Appeals correctly rejected appellants' view of the contract, stating that it concurred in the trial court's conclusion that a reading of the contract left no doubt that full title, not a mere security title, vested in the Government upon the making of partial payments.

3. The third question, namely, whether the *ad valorem* property tax on the property of the United States is constitutionally valid because the tax was assessed to the contractor and not directly to the United States, is completely answered by *United States v. Allegheny County*, 322 U. S. 174, and *Kern-Limerick, Inc. v. Scurlock*, 347 U. S. 110. Property

which belongs to the Federal Government is not subject to local property taxation merely because the property is in the possession of another or merely because the tax is to be paid by a private party.

Accordingly, it is respectfully submitted that the appeal should be dismissed or, in the alternative, that the judgment of the Court of Appeals for the Sixth Circuit should be affirmed.

J. LEE RANKIN,

Solicitor General.

CHARLES K. RICE,

Assistant Attorney General.

HILBERT P. ZARKY,

LYLE M. TURNER,

H. EUGENE HEINE, JR.,

Attorneys.

OCTOBER 1956.